Supreme Court, U.S.
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Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

ALAN STEIN and KAREN STEIN
Petitioners,

vs.

PARADIGM MIRASOL, LLC,
a Florida limited-liability company
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

The ruling by the 11th Circuit Court of Appeals' (the "**Ruling**") presents the following three questions of great public importance, all of which are within the character of reasons this court considers in granting a petition for certiorari:

1. Whether the Ruling exhibits a bias against the Steins for being real-estate purchasers during the recent housing "bubble," which so far departs from the accepted and usual course of proceedings as to call for an exercise of this court's supervisory power. The Ruling makes several derogatory, unwarranted, and false allegations against them, NONE of which was in the record or relevant to any issue before the Court of Appeals. As a result, they were denied their Due-Process right to a fair and impartial review of the District Court's decision.

2. Whether the Ruling conflicts with relevant decisions of the Florida Supreme Court and the United States Supreme Court. At issue was whether Paradigm Mirasol, LLC ("**Paradigm**"), a real-estate developer, was contractually obligated to finish constructing the subject condominium within two years, and thus exempt from the Interstate Land Sales Full Disclosure Act (*i.e.*, 15 U.S.C. §1701, *et seq.*, "**ILSA**"). The federal agency charged with interpreting ILSA says this issue is a matter of state contract law; however, despite being required by this court to follow that agency directive, the Court of Appeals expressly refused to follow both that directive and the Florida Supreme Court's holding on this issue, apparently due to the bias discussed above.

3. Whether the Ruling contradicts how the United States Supreme Court (and other federal circuit

courts of appeal) requires ILSA's exemptions to be interpreted. Specifically, those exemptions must be strictly and narrowly construed to effectuate ILSA's remedial purpose of preventing fraud; however, a plain reading of the Ruling shows the Court of Appeals went out of its way to broadly interpret the exemption at issue in Paradigm's favor, again apparently due to the bias discussed above.

List of Parties

The petitioners, Alan and Karen Stein, were the plaintiffs in the lower-court proceedings of this case and the appellees before the United States Court of Appeals for the Eleventh Circuit.

The respondent, Paradigm Mirasol, LLC, a Florida Limited-Liability corporation, was the defendant in the lower-court proceedings and the appellant before the United States Court of Appeals for the Eleventh Circuit.

Corporate disclosure statement and Certificate of interested persons

Neither of the petitioners is incorporated, and therefore they have no parent corporation of which to disclose ownership.

Besides themselves, the only interested parties to this appeal of which the petitioners are aware are:

Joseph Stern, Esq., counsel for petitioners;
SARAGA & LIPSHY, P.A., counsel for petitioners;
Paradigm Mirasol, LLC, respondent;
Arthur Friedman, co-owner of respondent;
Steven Samaha, co-owner of respondent;
Mary M. Clapp, Esq., counsel for respondent;
John H. Rains III, Esq., counsel for respondent;
John H. Rains III, P.A., counsel for respondent;
Katherine Earle Yanes, Esq., counsel for respondent;

James E. Felman, Esq., counsel for respondent;
Kynes, Markman & Felman, P.A., counsel for respondent;
Hon. John E. Steele, United States District Judge, Middle District of Florida;
Hon. Joseph M. Hood, United States District Judge, United States District Court for the Eastern District of Kentucky (sitting by designation on the United States Court of Appeals for the 11th Circuit);
Hon. Gerald Bard Tjoflat, United States Circuit Judge, United States Court of Appeals for the 11th Circuit;
Hon. Ed Carnes, United States Circuit Judge, United States Court of Appeals for the 11th Circuit

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Opinion Below

On September 30, 2009, the United States Court of Appeals for the Eleventh Circuit issued its opinion reversing the District Court's opinion. On November 30, 2009, the Court of Appeals denied, without opinion, the Steins' petition for a rehearing.

Statement of Jurisdiction

The Steins seek review of the decision issued on September 30, 2009 by the United States Court of Appeals for the Eleventh Circuit, and the judgment of that court, issued as mandate on December 8, 2009, pursuant to the certiorari jurisdiction conferred on this court by 28 U.S.C. §1254(1).

This petition is timely, having been filed within 90 days after the Court of Appeal's denial of the Steins' petition for rehearing (*i.e.*, November 30, 2009) and within 90 days after entry of the Court of Appeals' judgment (*i.e.*, December 8, 2009). 28 U.S.C. §2101(c) and Supreme Court Rule 13.3

Statutory Provisions Involved

15 U.S.C. §§1702 & 1707, and 61 Fed. Reg. 13596, 13603 (Mar. 27, 1996), the provisions of which are lengthy and therefore set out in Appendices F, G & H, respectively, pursuant to Supreme Court Rule 14.1(f).

Statement of the Case

On March 9, 2005, the Steins and Paradigm executed a contract (the "**Contract**") to purchase and sell a unit (the "**Unit**") in a condominium Paradigm was constructing in Miromar Lakes, Florida. The Steins gave Paradigm a deposit of $205,370.00 (the "**Deposit**"). Paradigm never provided them with a property report (the "**Property Report**") for the condominium, as per 15 U.S.C. §1707.

On or about January 16, 2007, the Steins gave notice to Paradigm that they were terminating the Contract for Paradigm's failure to provide them with the Property Report. The Steins also demanded return of the Deposit, which Paradigm refused to do, claiming to be exempt from ILSA's reporting and registration requirements. The Steins did not close on the Unit, and they filed suit in the District Court, pursuant to 28 U.S.C. §1331, since this action presented a federal question, because their claims pertained to violations of Federal law.

On February 7,2008, the District Court issued an order on the parties' cross-motions for summary judgment. This order granted the Steins' motion on their claim for violation of 15 U.S.C. §1702,[1] allowing them to terminate the contact and obtain a refund of the Deposit. Paradigm then timely filed its notice of appeal to the 11th Circuit Court of Appeals, which reversed the District Court's decision. The Steins filed a petition for rehearing *en banc*, which was denied.

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1. The District Court granted summary judgment to Paradigm on the Steins' other claim (*i.e.*, for conversion); however, that ruling is not at issue before this court.

Summary of the Argument

The Ruling made several derogatory, unwarranted, and false allegations about the Steins, showing the panel members' extreme bias against them for being real-estate purchasers during the recent housing "bubble." Even if these allegations were true, and in the record, they were irrelevant to the issues before the Court of Appeals. Even if these allegations were relevant, the Ruling failed to state other pertinent facts which would have disproved these allegations. As a result, the Steins were denied their Due-Process right to a fair and impartial review of the lower court's decision.

This court's decisions required the Court of Appeals to follow the HUD Guidelines when determining whether Paradigm was exempt from ILSA. The Guidelines defer to state contract law in determining whether a developer is contractually "obligated" to finish construction within two years, and thus qualify for the exemption. Nevertheless, the Court of Appeals expressly refused to follow either the HUD Guidelines or the Florida State Supreme Court on this issue, instead relying on principles of statutory interpretation from federal decisions.

Finally, the Court of Appeals again failed to follow this court when interpreting the exemption at issue. This court has repeatedly said remedial statutes enacted to avoid fraud, such as ILSA, must be broadly construed, with exemptions narrowly construed. Nevertheless, the panel members simply ignored this principle, as the panel members clearly went out of their way to interpret the exemption broadly for Paradigm – and apparently due to the extreme personal bias mentioned above.

Argument

This action concerns whether Paradigm, as a real-estate developer, was exempt from the reporting and registration requirements of ILSA. Specifically, Paradigm claimed to be exempt under 15 U.S.C. §1702(a)(2) (the "**Exemption**"), because the Contract required it to finish construction within two years (the "**Completion Obligation**"). The Steins said Paradigm was not exempt, because the Contract did not actually obligate Paradigm to timely finish construction.

1. The Court of Appeals' decision was the result of extreme bias.

A party makes a case for the Supreme Court to exercise its supervisory power when claiming a Court of Appeals has departed from the accepted and usual course of judicial proceedings by manifesting a strong bias for or against a particular class of litigants. *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 463, 79 S.Ct. 921, 936, at n. 34, (1959)(Frankfurter, J., dissenting). This petition presents **exactly** such a case, because, despite the panel members' sworn duty to fairly and impartially review the District Court's decision, they reversed that decision because of an extreme bias against the Steins for being real-estate purchasers during the recent housing "bubble." This point is proven by the Ruling's numerous derogatory and false allegations against the Steins, **NONE** of which was in the record or relevant to whether they could rescind the Contract for Paradigm's non-compliance with ILSA. *See, Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537, 542 (SD Fla. 1985) and *Pigott v. Sanibel Development, LLC*, 576 F.Supp. 2d 1258, 1264 at n. 16 (SD Ala. 2008)(actual injury is irrelevant to suing for ILSA non-disclosure). These allegations include:

> "All bubbles eventually burst, as this one did. The bigger the bubble, the bigger the pop. The bigger the pop, the bigger the losses. And the bigger the losses, the more likely litigation will ensue. Hence, this case." (Appx. A, p. 33);
> "After the housing bubble burst, the Steins had second thoughts about their decision to purchase the condominium unit. Wanting out of their contract, they seized on (*sic*) to the [ILSA], a federal statute that has become an increasingly popular means of channeling buyer's remorse into a legal defense to a breach-of-contract claim." (Appx. A, p. 34);
> "Just three weeks before the condominium was completed, the Steins gave Paradigm written notice that they were terminating the contract because Paradigm had failed to provide them with a property report, as required by the [ILSA]." (Appx. A, p. 34); and
> "If the contract is exempt, Paradigm is entitled to a judgment in its favor. With the judgment goes the money the Steins deposited with Paradigm." (Appx. A, p. 36).

These allegations virtually advertised the panel members' extreme bias against the Steins as real-estate purchasers during the housing "bubble," since there is simply no other reasonable explanation for them. This bias made a fair and impartial review of the District Court's decision impossible, thus denying the Steins their Due-Process right to such a review. *See, Liteky v. U.S.*, 510 U.S. 540, 554, 114 S.Ct. 1147, 1157 (1994)(judicial remarks will support challenge for bias or impartiality when they show high degree of antagonism making fair judgment impossible) and

Floriou v. Gonzales, 481 F.3d 970, 973 (7th Cir. 2007)(actions manifesting clear bias can deny due process). *See also, Santidrian v. Landmark Custom Ranches, Inc.*, 2009 WL 1955757 (SD Fla. 2009)(p. 5) (court may not look beyond ILSA's plain language for equitable reason to exempt developer); *In re Doe*, 973 So.2d 548, 575 (Fla.2nd D.C.A. 2008)(Villente, J., dissenting) (judge may not infuse personal view to skew result legally required by legislation); and *Russell v. Russell*, 507 So.2d 661, 662 (Fla. 4th D.C.A. 1987) (hard facts make bad law, and usually where judges try to force a particular result).

Since these allegations had no record basis, the Steins could not properly rebut them. Nevertheless, their petition for rehearing *en banc* noted the following: they did not cancel the Contract out of "buyer's remorse," but because Alan Stein was – and still is – suffering from an extremely rare form of cancer with a less-than 25% survival rate. Also, he was diagnosed in March 2006, which was **before** the housing "bubble" burst. Finally, they did terminate the Contract three weeks before the Unit was finished, but that was after **nine months** of negotiations with Paradigm. These facts belie the allegation they were greedy investors with"buyer's remorse" during the housing "bubble."

2. <u>**The panel did not follow state contract law**</u>.

This court requires all federal courts to follow an administrative agency's reasonable interpretation of federal law. *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-45, 104 S.Ct. 2778, 2781-82 (1984). *Accord, Cuomo v. Clearing House Assn., LLC*, 129 So.2d 2710, 2715 (2009)(under *Chevron*, courts must defer to agency's reasonable interpretation of statute it

is charged with administering), *Barnhart v. Thomas*, 540 U.S. 20, 29, 24 S.Ct. 376, 382 (2003)(proper *Chevron* inquiry is not whether agency's construction of statute can give undesirable result, but whether construction is reasonable), and *Barnhart v. Walton*, 535 U.S. 212, 218, 122 S.Ct. 1265, 1269 (2002) (if statute is silent or ambiguous on Congressional intent, court must follow agency's permissible construction of the statute). The agency which interprets ILSA is HUD, whose guidelines (the "**Guidelines**") say determining if a developer is contractually "obligated" to timely finish construction **is a matter of state contract law, not federal law.** 61 Fed. Reg. 13596, 13603 (Mar. 27, 1996). *Accord, Kamel v. Kenco*, 321 Fed.Appx. 807, 809 (11th Cir. 2008)[2]

Despite this court's long-standing principle of agency deference, the Court of Appeals expressly refused to give the HUD Guidelines "great deference"

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2. Several Federal District Courts in Florida have also followed this principle. *See, Stefan v. Singer Island Condominiums, Ltd.*, 2009 WL 426291 (SD Fla. 2009)(p. 6), *Rosenstein v. The Edge Investors, LP*, 2009 WL 903806 (SD Fla. 2009)(p. 6), *MacGuire v. Southern Homes of Palm Beach, LLC*, 591 F.Supp.2d 1263, 1267 (SD Fla. 2008), *Rondini v. Evernia Properties, LLLC*, 2008 WL 793512 (SD Fla. 2008)(p. 2), *Pilato v. The Edge Investors, LP*, 609 F.Supp.2d 1301, 1307 (SD Fla. 2009), *DiSimone v. LDG South II, LLC*, 2009 WL 210711 (MD Fla. 2009)(p. 2), *Barry v. Midtown Miami No.4, LLC*, 2008 WL 6802926 (SD Fla. 2008)(p.4), *Harvey v. Lake Buena Vista Resort*, 568 F.Supp.2d 1354, 1362 (MD Fla. 2008), *Jankus v. The Edge Investors, L.P.*, 650 F.Supp.2d 1248, 1254 (SD Fla. 2009), *Van Hook v. Residences at Coconut Point, LLC*, 2008 WL 2740331 (MD Fla. 2008) (p. 2), *Winterrowd v. Taylor Morrison Svcs., Inc.*, 2009 WL 2149239 (MD Fla. 2009)(p. 2), *Pellegrino v. Koeckritz Devel. Co. of Boca Raton, LLC*, 2008 WL 6128748 (SD Fla. 2008) (p. 3), and *Caswell v. Antilles Vero Beach, LLC*, 2008 WL 4279555 (MD Fla. 2008)(p. 2).

(Appx. A, p. 45, n. 5 & pp. 49-50, n. 7)[3] or to follow the Florida Supreme Court's holding on this issue (Appx. A, p. 45 n. 5) as set forth in *Samara Development Corp. v. Marlow*, 556 So.2d 1097 (Fla. 1990), which says:

> "We approve the decision below and **hold** that, in order for the sale of a condominium in Florida to be exempt from the provisions of the Interstate Land Sales Full Disclosure Act, the contract must unconditionally obligate the developer to complete construction within two years and not limit the purchaser's remedies of specific performance or damages."

Samara, supra, at 1098 (Fla. 1990)(emphasis added).[4] Instead, the Court of Appeals said (at Appx. A, p. 38) it would construe the term "obligating" by using statutory interpretation principles from **federal**

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3. The Court of Appeals erroneously cites *Reno v. Koray*, 515 U.S. 50, 61,115 S.Ct. 2021, 2027 (1995), to support its claim that the HUD Guidelines are not entitled to full *Chevron* deference because they are not published regulations (Appx. A, p. 50, n. 7), but *Koray* does not say this. Rather, *Koray* says an agency guideline is akin to an interpretive rule and therefore requires some deference, especially when involving a permissible statutory construction. *Id.* Thus, *Koray* is consistent with *Chevron* on the deference to be given the HUD Guidelines, since they do not interpret the term "obligates," but instead defer to state contract law on this issue.

4. The District Court referred (at Appx. C, p. 19) to this language as "dicta;" however, **as the court's express holding, it was obviously not *dicta*.** *See, Advisory Opinion to the Attorney General, Re: 1.35% Property Tax Cap*, 2 So.3d 968, 979 (Fla. 2009)(statement unconnected to the court's holding is *dicta*); *and Thomas v. Florida*, 3 So.3d 387, 390 (Fla. 2nd D.C.A. 2009) and *Harris v. McKinney*, 20 So.3d 400, 404 (Fla. 2nd D.C.A. 2009) (statement that is not the court's holding is *dicta*).

decisions, rather than Florida decisions on state contract law. Not only did the Court of Appeals fail to follow the holding in *Samara*, the court also failed to follow recent decisions of Florida's District Court's of Appeal[5] which followed Judge Steele's District Court opinion and adopted impossibility of performance as the standard for determining whether the developer's Completion Obligation qualifies for the Exemption. These decisions were binding on the Court of Appeals, because the Eleventh Circuit has said it's panels must follow decisions of a state's appellate courts unless there is a strong indication the state's highest court would decide the issue differently. *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002). *See also, Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 412, 61 S.Ct. 623, 625 (1941)(federal court's failure to follow state law presents question of public importance, as it involves relation of federal courts to the states) and *Force v. Kolhage*, 198 Fed. Appx. 827, 828-29 (10th Cir. 2006)(federal courts lack jurisdiction to review state-court decisions on state-law matters). The Court of Appeals was aware of these decisions[6] but apparently ignored them.

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5. *i.e., Mailloux v. Briella Townhomes, LLC*, 3 So.3rd 394, 396 (Fla. 4th D.C.A. 2009); *Home Devco/Tivoli Isles, LLC v. Silver*, 2009 WL 3018146 (Fla. 4th D.C.A. 2009); and *Plaza Court, LP v. Baker-Chaput*, 2009 WL 1809921 (Fla. 5th D.C.A. 2009).

6. The panel was notified of *Plaza Court* via letter from the Steins' counsel, dated June 29, 2009 (per rule 28(j), Fed.R.App.P.). The panel was notified of *Mailloux* via letter from Paradigm's counsel, dated February 6, 2009 (also per rule 28(j), Fed.R.App.P.). *Home Devco* was issued a week before the Ruling.

3. The panel broadly interpreted the Exemption.

This court has repeatedly said statutes enacted to avoid fraud (such as ILSA), must be flexibly and liberally construed in favor of broad coverage to effectuate their remedial purpose. *Herman & McLean v. Huddleston*, 459 U.S. 375, 386-87, 103 S.Ct. 683, 689 (1983), *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151, 92 S.Ct. 1456, 1471 (1972) *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12, 92 S.Ct. 165, 169 (1971), and *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195, 84 S.Ct. 275, 284-85 (1963). Exemptions to remedial statutes must be narrowly construed. *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009), *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473, 476 (1st Cir., 2009), *Olsen v. Lake Country, Inc.*, 955 F.2d 201, 206 (4th Cir. 1991), *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 105 (3d Cir.1990), *DeLuz Ranchos Investments, Ltd. v. Coldwell Banker & Co.*, 608 F.2d1297, 1302 (9th Cir. 1979), and *Samara, supra*, at 1100(exemptions to ILSA must be strictly and narrowly construed against the developer).

Several federal district court decisions in Florida have also followed these principles,[7] but the Ruling never even mentions them, which strongly suggests the panel members ignored them. *Cf., National Broadcasting Co., Inc. v. Bear Stearns & Co.*, Inc. 165 F.3d 184, 189 (2nd Cir. 1999)(absence of any reference to private dispute resolution proceedings strongly

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7. *See, Gentry v. Harborage Cottages-Stuart, LLLP*, 602 F.Supp.2d 1239, 1248 (SD Fla. 2009), *Harvey, supra*, *Jankus, supra*, at 1253, and *Tedder v. Harbour Phase I Owners, LLC*, 2009 WL 1043911 (MD Fla. 2009)(p. 2)

suggests Congress did not consider them). Furthermore, a plain reading of the Ruling clearly shows that, instead of narrowly interpreting the Exemption, the panel members went out of their way to interpret the Exemption broadly for Paradigm – and apparently due to the extreme personal bias mentioned above. Thus, the Ruling directly conflicts with how the United States Supreme Court (and the other federal Circuit Courts) says a consumer-protection statute designed to prevent fraud (such as ILSA) must be interpreted.

Conclusion

The Court of Appeals falsely assumed the Steins were suffering buyer's remorse from second thoughts about purchasing the Unit during the recent housing "bubble." This false – and irrelevant – assumption (based on facts not on the record, and flatly contradicted in the petition for rehearing) was the source of the court's extreme bias against the Steins. This bias permeated the Ruling, because the court deliberately and improperly avoided or simply ignored relevant and binding decisions of both the United States Supreme Court and the Florida Supreme Court. Consequently, the Steins were denied their Due-Process right to a fair and impartial review of the lower court's decision. The only way to remedy this situation is for the Supreme Court to exercise its supervisory power, by granting this petition and reviewing the Ruling.

Wherefore, the Steins request this court grant their petition and review the judgment in this case, reverse that judgment, and grant them any further relief the court deems appropriate.

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Appendix A – Order of the United States District Court for the Middle District of Florida Dated and filed February 7, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ALAN STEIN and KAREN STEIN,
Plaintiffs

v. **Case No. 2:07-cv-71-FTM-29DNF**

PARADIGM MIRASOL, LLC,
Defendant.
_____/

ORDER

OPINION AND ORDER
JOHN E. STEELE, District Judge.
This matter comes before the Court on the parties' cross-motions for summary judgment (Docs.# 10, # 33). The parties subsequently filed responses in opposition, affidavits, a reply, and supplemental authority. (Docs. 14, 15, 19, 21, 26, 32, 35.)

The parties agreed in the Joint Pre-Trial Statement that there are no disputed issues of fact. (Doc. # 38, p. 3.) At issue is whether defendant was required to comply with the reporting and disclosure requirements of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 et seq. (ILSFDA).

I.

The agreed facts are as follows: On or about March 9, 2005, plaintiffs Alan Stein and Karen Stein (the Steins or plaintiffs) entered into an Agreement for Purchase and Sale of Real Estate (Doc. # 1-2) with defendant Paradigm Mirasol, LLC (Paradigm or defendant) for the purchase of a condominium described as Unit 507, Mirasol I, at Miromar Lakes. On or about April 1, 2005, an addendum was added, and on or about May 18, 2006, a second addendum was added. These documents collectively are referred to as the "Agreement." Pursuant to the Agreement, the Steins paid Paradigm $179,180 in deposits and $26,190 for optional upgrades requested by the Steins. As allowed in the Agreement, $89,590 of this money is being held in escrow by Miromar Title Company; $89,590 of the money was used in the construction of the condominium; and $26,190 of the money was used in purchasing and installing the requested upgrades. In the Second Addendum to the Agreement the Steins agreed that the $26,190 for upgrades was non-refundable and would not be returned for any reason.

On January 16, 2007, the Steins provided written notice to Paradigm that they were terminating the Agreement and demanding the return of their deposits. The Steins asserted that termination was permissible and the return of the deposits was required because Paradigm had not complied with the ILSFDA.

Construction of the condominium was completed within two years of the date of the Agreement. A Certificate of Occupancy was issued on February 7, 2007, and Paradigm provided the Steins with notice of

the issuance of the Certificate of Occupancy on February 8, 2007. Paradigm was ready, willing and able to close on the condominium after February 7, 2007, and attempted to schedule a closing date for February 20, 2007. The Steins did not close on the condominium.

II.

Plaintiffs filed a two-count Complaint (Doc. # 1). Count One alleges that defendant violated the ILSFDA; Count Two alleges a state law claim of conversion for failing to return the deposits. Defendant filed a Counterclaim (Doc. # 13) alleging breach of contract for failing to close on the Agreement after issuance of the Certificate of Occupancy.

Paradigm agrees that it did not provide the Steins with a Property Report that met the requirements of 15 U.S.C. §1707, but asserts that the sale of the condominium was exempt from the provisions of the ILSFDA. The parties agree that if the Agreement is *not* exempt from the reporting and registration requirements of the ILSFDA, (1) the Steins were entitled to terminate the Agreement on January 16, 2007; and (2) the Steins are entitled to a return of the deposits in the amount of $179,180 (the parties dispute whether the $26,190 for upgrades should be returned). The parties further agree that if the Agreement *is* exempt from the reporting and registration requirements of ILSFDA, (1) Paradigm has not breached the Agreement, (2) the Steins' failure to close on the condominium is a breach of the Agreement, and (3) Paradigm is entitled to retain the deposits in the amount of $179,180 as liquidated

damages, plus the $26,190 as agreed damages for the upgrades.

III.

The ILSFDA is an anti-fraud statute that uses disclosure as its primary tool to protect purchasers from unscrupulous sales of undeveloped home sites. *Winter v. Hollingsworth Props., Inc.*, 777 F.2d 1444, 1446-47 (11th Cir.1985). Section 1703(a) makes it unlawful to sell "any lot not exempt under section 1702" unless the seller complies with the provisions of the ILSFDA, including disclosure of a Property Report prior to the purchaser signing a contract. Selling a condominium unit falls within the definition of selling a "lot" within the meaning of the ILSFDA. *Winter*, 777 F.2d at 1449. The sale of a condominium will be exempt from the ILSFDA, however, if the sale is "under a contract obligating the seller ... to erect [a condominium] thereon within a period of two years." Section 1702(a)(2). [FN1] The parties dispute whether the Agreement constitutes a contract "obligating" the seller to erect a condominium on the lot within two years. [FN2]

FN1. 15 U.S.C. § 1702(a)(2) provides:
Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to-
(2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

FN 2. The parties do not dispute that defendant did in fact erect the condominium within the two year period. The dispute is whether the Agreement obligated defendant to do so.

The interpretation of a federal statute, particularly a statute with nationwide application, is governed by federal law. *See, e.g., In re Prudential of Fla. Leasing, Inc.*, 478 F.3d 1291, 1298 (11th Cir.2007); *Reed v. Heil Co.*, 206 F.3d 1055, 1059 (11th Cir.2000). Additionally, state law governing contract interpretation and enforcement will impact whether a given contract "obligates" the seller to build the condominium. While the Court looks to Florida law as to the effect of the Agreement, state law does not control the interpretation of the ILSFDA. *Harvey v. Lake Buena Vista Resort, LLC*, 6:07-cv-1641-Orl-DAB, 2008 WL 254131, *3 n. 2 (M.D.Fla.2008).

While the ILSFDA defines some terms, 15 U.S.C. § 1701, and regulations under the statute define other terms, 24 C.F.R. § 1710.1 (2007), neither defines "obligating" or "obligates." In 1979 the Secretary published an interpretive rule entitled "Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act," 44 Fed.Reg. 24010 (1979). This was superceded by another version in 1984, 49 Fed.Reg. 31375 (1984), but this was removed on March 27, 1996, as part of a streamlining process. 61 Fed.Reg. 13596 (1996). The information was moved to the HUD website, where it is now available as "Supplemental Information to Part 1710: Guidelines for Exemptions Available Under the Interstate Land

Sales Full Disclosure1328 Act." www. hud. gov/ offices/hsg/sfh/ils/ilsexemp. cfm.

The Guidelines state that it is intended to clarify HUD polices and positions with regard to the statutory exemptions, and that it is an interpretive rule and not a substantive regulation. 61 Fed.Reg. 13596, 13601 (1996). As an interpretive agency rule, the Guidelines are entitled to some deference. *Reno v. Koray,* 515 U.S. 50, 59, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995). In pertinent part, these Guidelines now provide:

> HUD's interpretation of what constitutes an obligation to construct a building relies on general principles of contract law. Provisions for ... remedies clauses are matters to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located. However, such clauses may not alter the obligation of the seller to build....
>
> The contract must not allow nonperformance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for reasons normally within the seller's control is not acceptable for use under this exemption. Similarly, contracts that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to

> are treated as lacking a realistic obligation to construct. HUD's position is not that a right to specific performance of construction must be expressed in the contract, but that any such right that purchasers have must not be negated. For example, a contract that provides for a refund or a damage action as the buyer's sole remedy would not be acceptable.
>
> Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected. For example, provisions to allow time extensions for events or occurrences such as acts of God, casualty losses or material shortages are generally permissible....
>
> Although the factual circumstances upon which nonperformance of a delay in performance is based may vary from transaction to transaction, as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control.

The Court concludes that a contract "obligates" the completion of a condominium within two years when that commitment to do so is real and not illusory. Another court has referred to this concept as a time

commitment that "unequivocally requires" timely construction, or as a "true obligation" or an "unwavering obligation." *Fortunato v. Windjammer Homebuilders, Inc.*, 8:04-cv-165-T-26MSS, 2006 WL 208777, *3 (M.D.Fla.2006) (J. Lazzara). To "obligate" the timely completion does not require that the contract be unconditional, so long as the condition(s) does not render the apparent obligation illusory. A two-year completion provision is not required to be an unconditional guarantee which imposes strict liability for noncompliance. *Atteberry v. Maumelle Co.*, 60 F.3d 415, 420 (8th Cir.1995) ("It is immediately apparent that while these guidelines say that the seller's obligation to build must be specific, they do not say, or even hint, that the obligation must be unconditional. Neither, of course, does the statute.") Such a strict liability for completion is not necessary to prevent the fraud against which the ILSFDA was intended to guard. The Court therefore rejects plaintiffs' argument that *any* condition on performance renders an agreement illusory. (Doc. # 10, pp. 2-3.)

Thus, the Court agrees only in part with statements in *Samara Dev. Corp. v. Marlow*, 556 So.2d 1097 (Fla.1990). The Court agrees that the obligation to complete construction within two years must not be illusory. *Id.* at 1099. The Court also agrees with the specific holding of *Samara*-that a limited remedy of specific performance or return of deposits renders the contract illusory. The Court does not agree, however, with *dicta* stating "[I]n order for the sale of a condominium in Florida to be exempt from the

provisions of the [ILSFDA], the contract must unconditionally obligate the developer to complete construction within two years and must not limit the purchaser's remedies of specific performance or damages." *Id.* at 1098. The idea that performance must be unconditional and that no limitations on remedies are acceptable was apparently influenced by language in the 1979 version of the Guidelines stating that "any conditions which qualify the obligation to complete a building within two years nullify the applicability of the exception." 44 Fed.Reg. 24,010, 24,012 (1979). While *Samara* quoted this language, 556 So.2d at 1099, it failed to note the next paragraph of those Guidelines, which stated: "However, contract provisions which provide for delays of construction completion dates beyond the two-year period are acceptable if such delays are legally supportable in the jurisdiction where the building is being erected as an impossibility of performance for reasons beyond the control of the developer. Provisions to allow time extensions for such things as acts of God or material shortages are generally permissible."

IV.

The issue becomes whether the Agreement has a real obligation to complete the condominium within two years, or whether its other provisions render that apparent obligation illusory. Two areas of the Agreement are pertinent: The provision which excludes certain delays from the two year period, and the limitations on the damages available to the buyers.

A.

The Agreement makes time of the essence, providing that "[t]ime is of the essence to this Agreement and specifically each and every paragraph, without limitation, in which a time period is involved." (*Id.* at p. 6.) The Agreement then excludes certain delays from the two year time of completion:

> Construction of the condominium unit will be complete and ready for possession within two (2) years from the execution of this Purchase Agreement in compliance with the Interstate Land Sales Full Disclosure Act; provided, however, that Seller shall not be responsible for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the Seller and the completion and occupancy date shall be extended accordingly.

(Doc. # 1-2, p. 7.) Plaintiffs argue that the "provided, however" language following the two year requirement results in a contract which does not actually obligate Paradigm to complete the condominium within two years. (Doc. # 10, p. 3.) Defendant responds that a *force majeure* clause is permitted under Florida law and does not undermine the obligation to complete the condominium within two years. (Doc. # 14, pp. 5-12.)

The Court rejects defendant's argument that because a *force majeure* clause is lawful in Florida such a clause does not take a contract outside the scope of the exemption. (Doc. # 14, pp. 6-7.) The issue is not whether such clauses are lawful in Florida; they

generally are. The issue is whether this enforceable clause so undermines the two-year requirement that it renders the provision illusory or not a real obligation.

The provision in the Agreement provides that the two year period is extended "for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the Seller ...." Not all of these delay exclusions render the completion time illusory. For example, delay for acts of God has a well established and limited definition that does not render the Agreement illusory.[FN3] The other exclusions, however, are broad enough to seriously undermine the obligation to complete the condominium within two years. This provision does not limit the permissible delays to those justifiable under an impossibility of performance [FN4], but allows exclusions for far less compelling reasons, culminating in the catchall "other delays beyond the control of the Seller." Thus, this clause is unlike those in the two cases cited by defendant which arguably found similar clauses permissible. In *Hardwick Props., Inc. v. Newbern,* 711 So.2d 35 (Fla. 1st DCA 1998), *review denied,* 727 So.2d 908 (Fla.1998), the provision required that all excusable delays must qualify under impossibility principles. Similarly, the provision in *Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537, 541 (S.D.Fla.1985) required that the delay caused by conditions beyond the control of the seller be "legally supportable under Florida law as impossible of performance."

FN3. *Florida Power Corp. v. City of Tallahassee,* 154 Fla. 638, 18 So.2d 671, 675 (1944) ("An act of God, such as will excuse nonperformance of a legal contract, must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence, and care or by the use of those means which the situation of the party renders it reasonable that he should employ.").

FN4. Impossibility of performance is employed with great caution, and if knowledge of the facts making performance impossible was available to the promisor or was foreseeable, the promisor cannot invoke them as a defense to nonperformance. *American Aviation, Inc. v. Aero-Flight Serv., Inc.,* 712 So.2d 809, 810 (Fla. 4th DCA 1998); *Cook v. Deltona Corp.,* 753 F.2d 1552, 1558 (11th Cir.1985).

In the Agreement in this case, none of the exclusions are required to satisfy impossibility standards, and the catchall "other delays beyond the control of the Seller" is certainly broad enough to allow the Seller to excuse completion on a wide variety of events.[FN5] The Court concludes that the provision in the Agreement extending the completion period for delays not qualifying under Florida's impossibility of performance principles renders the obligation to complete the condominium within two years illusory. Therefore the Agreement is not exempt from the

ILSFDA because it does not "obligate" completion of the condominium within two years.

FN5. For example, excessive rain has been found to be a condition beyond a developer's control excusing timely performance, *Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So.2d 922 (Fla. 2d DCA 1987), as has a heart attack of the president of the developer-corporation, *Camacho Enters., Inc. v. Better Constr., Inc.*, 343 So.2d 1296 (Fla. 3d DCA 1977).

B.

Plaintiffs also argue that the limitation to direct and actual damages renders the two year commitment in the Agreement illusory. (Doc. # 10, pp. 3-4.) Under the *"Default"* section, the Agreement provided:

> If Seller should default in the performance of any of the obligations to be performed by Seller pursuant to this Agreement, Buyer shall notify Seller of such default, and Seller will have ten (10) days after receipt of said notice within which to fulfill Seller's obligations. If, for any reason other than Seller's failure to make Seller's title marketable, Seller fails to perform this Agreement and Buyer is not in default of this Agreement, Buyer may seek specific performance or elect to terminate this Agreement by written notice to Seller, in which event the deposit shall be returned to Buyer upon demand, with any interest accrued thereon, and Buyer may commence an action to

> recover only actual and direct damages (out-of-pocket amounts actually paid by Buyer to third parties). *Under no circumstances may Buyer seek or be entitled to recover any special, consequential, punitive, speculative or indirect damages, all of which Buyer specifically waives, from Seller for any breach by Seller of its obligation under this Agreement or any representation, warranty or covenant of Seller hereunder.*

(*Id.* at p. 6, emphasis added.) The Agreement thus allows the buyers to seek specific performance, or elect to terminate the Agreement and obtain their deposit with any accrued interest, or to seek actual and direct (out of pocket) damages, but not special, consequential, punitive, speculative, or indirect damages. Such a waiver provision is valid in Florida. *Ament v. One Las Olas, Ltd.*, 898 So.2d 147, 150-51 (Fla. 4th DCA 2005).

The Court rejects plaintiffs' argument that *any* limitation on a right to seek damages renders the Agreement illusory. The limitation against speculative damages does not render the two-year completion requirement illusory because speculative damages are not recoverable. *AR Holland Inc. v. Wendco Corp.*, 884 So.2d 1006 (Fla. 1st DCA 2004). The limitation against punitive damages does not render the two-year completion requirement illusory because punitive damages are not recoverable for mere breach of contract. *Ferguson Transp., Inc. v. North Am. Van Lines, Inc.*, 687 So.2d 821 (Fla.1996).

The restriction on special damages is a different matter. "Special damages" "are damages that do not follow by implication of law merely upon proof of the breach." *Land Title of Cent. Fla., LLC v. Jimenez*, 946 So.2d 90, 93 (Fla. 5th DCA 2006). Special damages can have particular importance in real estate matters in Florida, since Florida's real estate market has long been subject to fluctuations which makes the prediction of losses difficult if not impossible. *Hutchison v. Tompkins*, 259 So.2d 129, 132 (Fla.1972). Thus in Florida one of the available types of special damages where the seller breaches a residential sales contract is "benefit of the bargain" damages for any increase between the purchase price and the fair market value after seller's breach. *Coppola Enters., Inc. v. Alfone*, 531 So.2d 334 (Fla.1988); *Seaside Community Dev. Corp. v. Edwards*, 573 So.2d 142 (Fla. 1st DCA 1991). Thus, precluding a buyer from seeking special damages can greatly impact the amount of damages available to a buyer, at least in certain cycles of Florida's real estate market. The Court concludes that precluding the availability of such special damages in all situations so undermines the remedy as to render the Agreement illusory under the ILSFDA.

The Court takes a different approach than did *Hardwick Props., Inc. v. Newbern*, 711 So.2d 35 (Fla. 1st DCA 1998), *review denied*, 727 So.2d 908 (Fla.1998). In that decision the Florida Court of Appeals held that a provision which precluded special and consequential damages did not necessarily render the contract illusory, and remanded for factual findings

by the trial court as to the amount of general damages recoverable and whether those damages were so insubstantial under the circumstances as to render the obligation illusory. The difficulty with this approach is that identical contract provisions may be illusory at one point in time in Contract A and not illusory months later in Contract B, depending upon the facts existing at the time of breach. For a national program such as the ILSFDA, this is untenable. Indeed, such an interpretation would encourage the type of speculating by developers the ILSFDA was intended to reduce, further undermining any true obligation to construct the condominium within two years.

V.

Because the Agreement is not exempt from the ILSFDA reporting requirements and it is undisputed that Paradigm did not provide the required Property Report, the Court finds plaintiffs were entitled to terminate the Agreement on January 16, 2007, and are entitled to the return of the deposits in the amount of $179,180.00. The parties dispute whether plaintiffs are entitled to the return of the $26,190.00 paid for option upgrades. This is based on the Second Addendum to the Agreement in which the Steins agreed that the $26,190 for upgrades was non-refundable and would not be returned for any reason. Where the contract is properly revoked, as here, and the condominium is in the same condition, as here, a purchaser is "entitled to all money paid by him or her under such contract or agreement." 15 U.S.C. §1703(e). *See also Engle Homes,*

Inc. v. Krasna, 766 So.2d 311, 313 (Fla. 4th DCA 2000). Additionally, since the Agreement is unlawful under the ILSFDA, the Second Addendum provision is not enforceable as contrary to public policy. Plaintiffs are entitled to a refund of the $26,190.00.

VI.

As to the conversion count, plaintiffs assert that Paradigm's retention of the deposit and upgrade funds was done with malice and disregard for plaintiffs' rights because of their failure to comply with ILSFDA. (Doc. # 10, p. 5.) Conversion is "an act of dominion wrongfully asserted over, and inconsistent with, another's possessory rights in personal property." *Joseph v. Chanin*, 940 So.2d 483, 486 (Fla. 4th DCA 2006) (citations omitted). Money is subject to conversion. *All Cargo Transp., Inc. v. Florida East Coast Ry. Co.*, 355 So.2d 178, 179 (Fla. 3d DCA 1978). In this case, the funds were used and kept in accordance with the Agreement to escrow the deposit, maintain the funds, and to otherwise apply the funds towards construction or upgrades. The parties agree that plaintiffs are not entitled to damages under their theory of conversion. (Doc. # 38, ¶ 19.) Damages are an element of a conversion claim, and without damages there can be no cause of action. Therefore, judgment will be entered in favor of defendant as to Count II.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiffs' Motion for Summary Judgment

(Doc. # 10) is **GRANTED** as to Count I and the Court finds that defendant is not exempt from its reporting obligations under ILSFDA; and **GRANTED** as to the Counterclaim for Breach of Contract (Doc. # 13, pp. 4-6).

2. Defendant's Dispositive Motion for Summary Judgment (Doc. # 33) is **GRANTED** as to Count II and is otherwise **DENIED**.

3. The Clerk is directed to enter judgment in favor of plaintiffs and against defendant as follows: Plaintiffs were entitled to terminate the Agreement on January 16, 2007, and are entitled to the return of $179,180.00 in deposits and $26,190.00 paid for option upgrades, including pre-judgment interest accrued thereon through February 7, 2008. Judgment shall enter in favor of defendant as to Count II, and plaintiff shall take nothing.

4. The Clerk is further directed to terminate all pending motions and remaining deadlines as moot, including the Final Pretrial Conference scheduled for Tuesday, February 19, 2008, and to close the file.

DONE and **ORDERED** in Fort Myers, Florida, on February 7, 2008

S/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

Appendix B – Judgment of the United States District Court for the Middle District of Florida, Dated and filed February 8, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ALAN STEIN and KAREN STEIN,
Plaintiffs

v. **Case No. 2:07-cv-71-FTM-29DNF**

PARADIGM MIRASOL, LLC,
Defendant.
_____/

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order entered on February 7, 2008, judgment is entered in favor of Plaintiffs and against Defendant as follows:

1. Plaintiffs were entitled to terminate the Agreement on January 16, 2007, and are entitled to the return of $179,180.00 in deposits and $26,190.00 paid for option upgrades, including pre-judgment interest accrued thereon through February 7, 2008.

2. Judgment shall enter in favor of Defendant as to Count II and Plaintiff shall take

nothing.

Dated: February 8, 2008

SHERYL L. LOESCH, CLERK

By: /s/ Dianne Nipper, Deputy Clerk

cc: All parties and counsel of record

Appendix C – Opinion of the United States Court of Appeals for the Eleventh Circuit, entered September 30, 3009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10983

D.C. Docket No. 07-00071-CV-FTM-29-DNF

ALAN STEIN, KAREN STEIN,
Plaintiffs-
Counter-Defendants-
Counter-Claimants-
Appellees,

versus

PARADIGM MIRASOL, LLC,
Defendant-
Counter-Claimant-
Counter-Defendant-
Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(September 30, 3009)

Before TJOFLAT and CARNES, Circuit Judges, and HOOD, District Judge.
CARNES, Circuit Judge:

In a market-based economy the price of housing, like other goods, is subject to swings. There was a sharp upward swing in housing prices between late 2000 and the end of 2005, and the resulting bubble was bigger in Florida than it was in most other states. Home prices there rose eighty-two percent in absolute terms during that short period, outstripping the national increase by thirty-one percent. See Gabriel Montes Rojas et al., The Florida Housing Boom, 3 Fla. Focus 1, 2 (2007). All bubbles eventually burst, as this one did. The bigger the bubble, the bigger the pop. The bigger the pop, the bigger the losses. And the bigger the losses, the more likely litigation will ensue. Hence this case.

I.

On March 9, 2005, Alan and Karen Stein signed a contract with Paradigm Mirasol, LLC to purchase for $895,900 a condominium unit in Mirasol I, a six-story condominium building that was being developed in a luxury resort community near Fort Myers, Florida. The Steins made a down payment of $205,370, which included a deposit of $179,180 and an additional payment of $26,190 for upgrades. The contract specified that time was of the essence and that the condominium would be built within two years, although the contract included a force majeure provision that allowed for delays under certain

circumstances. The contract also specifically waived the Steins' right to speculative, punitive, and special damages. As a result, if Paradigm breached the contract the remedies available to the Steins were limited; they could choose specific performance or they could get back their deposit with interest and any actual damages.

After the housing bubble burst, the Steins had second thoughts about their decision to purchase the condominium unit. Wanting out of their contract, they seized on to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq*, a federal statute that has become an increasingly popular means of channeling buyer's remorse into a legal defense to a breach of contract claim. On January 16, 2007, just three weeks before the condominium was completed, the Steins gave Paradigm written notice that they were terminating the contract because Paradigm had failed to provide them with a property report as required by the Disclosure Act. The Steins also demanded that Paradigm return all of the $205,370 they had paid. Paradigm refused, contending that the contract between the parties fits within the exemption set out in the Act for "the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years." *See* 15 U.S.C. § 1702(a)(2).

Paradigm did complete construction of the condominium building and the Stein's unit in two years, as it had contracted to do. On February 8, 2007,

building thereon within a period of two years." *See* 15 U.S.C. § 1702(a)(2).

Paradigm did complete construction of the condominium building and the Stein's unit in two years, as it had contracted to do. On February 8, 2007, twenty three months after the contract was signed, Paradigm provided the Steins with a notice of issuance of the Certificate of Occupancy. That same day, the Steins filed a complaint in district court, alleging that Paradigm had violated the Disclosure Act and seeking to revoke the contract and to recover damages and attorney's fees.[1] Undeterred, Paradigm attempted to schedule a closing date of February 20, 2007, which would have been within the two-year completion period. The Steins refused to close. Paradigm filed a counterclaim seeking to retain the Steins' deposit as liquidated damages.

The parties agreed that the material facts were undisputed and filed cross motions for summary judgment. The district court granted summary judgment in favor of the Steins, allowing them to terminate the contract and requiring Paradigm to return all of the money the Steins had paid it. The court held that the contract's force majeure clause

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1. The complaint also alleged a state law claim for conversion based on Paradigm's refusal to return the deposits.

II.

This case turns on whether the contract is exempt from the requirements of the Interstate Land Sales Full Disclosure Act. *See* 15 U.S.C. §1702(a)(2). If, as the district court concluded, the contract is not exempt, the Steins are entitled to the judgment they received. If the contract is exempt, Paradigm is entitled to a judgment in its favor. With the judgment goes the money the Steins deposited with Paradigm.

The Disclosure Act is a consumer protection statute that "was intended to curb abuses accompanying interstate land sales." *Winter v. Hollingsworth Props., Inc.*, 777 F.2d 1444, 1448 (11th Cir. 1985). Although its primary purpose is to "protect purchasers from unscrupulous sales of undeveloped home sites," *id.* at 1447, it also applies to the sale of developed land, including the sale of condominiums, *id.* at 1449. The Act "utiliz[es] disclosure as its primary tool" to discourage fraud. *Id.* at 1447. It requires developers selling or leasing property to provide the purchaser with a property report before the sales contract is signed. *See* 15 U.S.C. §1703(a)(1)(B). If the developer fails to provide a property report, the purchaser generally has the right to revoke the contract. *Id.* §1703(c). Paradigm did not provide the Steins with the property report.

The Disclosure Act does include a list of exemptions from its requirements. *See id.* §1702(a). The one at the center of this case is the exemption that applies to"the sale or lease . . . of land under a contract

obligating the seller or lessor to erect . . . a [condominium] building thereon within a period of two years." *Id.* §1702(a)(2). The dispute is over the meaning of the word "obligating." The contract provided that Paradigm would complete construction of the Steins' condominium within two years and Paradigm actually did so. But was the contract one "obligating" Paradigm to do so within the meaning of the exemption provision in §1702(a)(2) of the Disclosure Act? That is the $64,000 question, or more accurately, the $205,370 question in this case.

A.

Deciding whether the contract in this case fits within the §1702(a)(2) exemption requires that we look to both federal and state law. Because the Disclosure Act is a federal statute its interpretation is a matter of federal law, *Caley Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 n.9 (11th Cir. 2005), so we will use principles of statutory interpretation from federal decisions to construe the term "obligating." We must also look to state contract law to see what remedies the Steins would have under the contract if Paradigm had not constructed the condominium within the two-year period specified in the §1702(a)(2) exemption. *See Markowitz v. Ne. Land Co.*, 906 F.2d 100, 105 (3d Cir. 1990). Florida law will inform us about the extent and nature of Paradigm's legally enforceable obligation to fulfill its contractual promise to complete construction within two years.

We begin our federal law analysis by looking to the text of the Disclosure Act. *See Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (*en banc*) ("[C]ourts should always begin the process of legislative interpretation . . . with the words of the statutory provision."); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. ("In construing a statute we must begin . . . with the language of the statute itself." (quotation marks omitted)). Although the Act defines some terms, neither the word "obligating" nor its variants "obligate" and "obligated" are among them. A term that is undefined in a statute carries its ordinary meaning. *Crawford v. Metro. Gov't of Nashville & Davidson County*, __ U.S. ___, 129 S. Ct. 846, 850 (2009); *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979).

The ordinary meaning of the word "obligating" is: binding by legal or moral duty. *See Merriam-Webster Online Dictionary*, http://www.merriam-webster.com (last visited Sept. 30, 2009) (defining "obligate" as "to bind legally or morally" and "obligation" as "something one is bound to do"); *American Heritage Dictionary* 857 (2d College ed. 1982) (defining "obligate" as "[t]o bind, compel, or constrain by a social, legal, or moral tie"); *Oxford English Dictionary Online*, http://dictionary.oed.com (draft rev. 2009) (defining "obligate" as "[t]o bind (a person) morally" or "[t]o bind (a person) legally"); *Random House Unabridged Dictionary* 1336 (2d ed. 1993) (defining "obligate" as "to bind or oblige morally or legally"); *see also Black's Law Dictionary* 1103 (8th ed. 2004) (defining "obligate" as "[t]o bind by legal or

The ordinary meaning of the word "obligating" is: binding by legal or moral duty. *See Merriam-Webster Online Dictionary*, http://www.merriam-webster.com (last visited Sept. 30, 2009) (defining "obligate" as "to bind legally or morally" and "obligation" as "something one is bound to do"); *American Heritage Dictionary* 857 (2d College ed. 1982) (defining "obligate" as "[t]o bind, compel, or constrain by a social, legal, or moral tie"); *Oxford English Dictionary Online*, http://dictionary.oed.com (draft rev. 2009) (defining "obligate" as "[t]o bind (a person) morally" or "[t]o bind (a person) legally"); *Random House Unabridged Dictionary* 1336 (2d ed. 1993) (defining "obligate" as "to bind or oblige morally or legally"); *see also Black's Law Dictionary* 1103 (8th ed. 2004) (defining "obligate" as "[t]o bind by legal or moral duty").[2] Federal statutes, generally speaking, concern themselves with legal instead of moral duties, and the Disclosure Act is no exception.

Given the context and the ordinary meaning of "obligating," the §702(a)(2) exemption applies when a contract imposes a legal duty on the developer to perform his promise to construct the condominium or other building within two years. The nature and extent of the duty a contract imposes, however, is a matter of state contract law. *See Norfolk & W. Ry. Co. v. Am.*

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2. Copies of the internet materials cited in this opinion are on file in the Clerk's Office. See 11th Cir. R. 36. I.O.P. 10.

you a new motive for not doing them.").

1.

If it appeared to the Steins that Paradigm was not going to complete construction within two years, they had available the remedy of specific performance to force Paradigm to live up to its agreement. Or, if the Steins preferred, they could have waited until it was too late for Paradigm to finish by the deadline. At that point their remedy would have been to rescind the contract, get their money back with interest, and recover any actual damages they had suffered.[3]

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3. The remedies clause of the contract provided:

> If, for any reason other than Seller's failure to make Seller's title marketable, Seller fails to perform this Agreement and Buyer is not in default of this Agreement, Buyer may seek specific performance or elect to terminate this Agreement by written notice to Seller, in which event the deposit shall be returned to Buyer upon demand, with any interest accrued thereon, and Buyer may commence an action to recover only actual and direct damages (out-of-pocket amounts actually paid by Buyer to third parties). Under no circumstances may Buyer seek or be entitled to recover any special, consequential, punitive, speculative or indirect damages, all of which Buyer specifically waives, from Seller for any breach by Seller of its obligation under this Agreement or any representation, warranty or covenant of Seller hereunder.

recover any actual damages they had suffered.[3]

The Steins contend that those remedies are not good enough to "obligate" Paradigm to construct the condominium in two years, as required by §1702(a)(2) of the Disclosure Act. They argue that without the remedies of special, consequential, punitive, speculative, and indirect damages, which they expressly waived in the contract, they cannot inflict enough legal pain on Paradigm to force it to carry out its contractual duty to finish within two years.

Specific performance or injunctive relief, if vigorously pursued, ordinarily will be enough to force a seller to fulfill its contractual obligations within the time a contract requires. Florida law provides that a

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omitted)); *Firestone v. Ferguson*, 372 So. 2d 490, 492 (Fla. 3d DCA 1979) (holding that a party may be held in contempt for refusing to comply with a specific performance judgment requiring the party to sell a piece of real estate).

A court order requiring a party to perform as it promised or face civil and criminal contempt sanctions obligates the party to keep its contractual promise. The theory behind injunctive relief, after all, is that parties can be forced to take action that the law demands. Because Florida law provided the Steins with the remedy of injunctive relief to force Paradigm to finish construction of the condominium within two years, the contract was one "obligating" Paradigm to do so.

It might be argued that Paradigm could evade its obligation under the contract and thwart the specific performance remedy simply by conveying the property to another purchaser, as it would have had a special incentive to do if the market value of the property had gone up. It is true that injunctive relief is not available where the property is conveyed to another purchaser before the injunction issues. *See Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1101 (Fla. 1990) ("Specific performance alone is not sufficient because the developer could sell the property to a third party in the interim, thereby nullifying the availability of specific performance."). In that situation, however, Florida law provides for more than specific

performance, regardless of what the contract says about remedies. Under Florida law, notwithstanding any contractual limitation of remedies, when the seller frustrates the buyer's specific performance right by selling the property to someone else, the buyer may recover the seller's entire profit from the sale. *See Seaside Cmty. Dev. Corp. v. Edwards*, 573 So. 2d 142, 146–47 (Fla. 1st DCA (holding that even though the contract limited the buyers' remedies to specific performance or a refund of earnest money, they were entitled to damages in the amount of the difference between the contract price and the fair market value of the property where the seller thwarted the buyers' right to specific performance by selling the property to another at a higher price). Thus, Paradigm would not have been able to deprive the Steins of the benefit of their bargain and take for itself any increase in the market value of the condominium during the construction period. Florida law would not permit that, regardless of the contract's remedies limitation clause.[4]

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4. Regardless of any breach by Paradigm, the Steins would not have been able to recover speculative or punitive damages. As the district court pointed out, however, under Florida law those types of damages are not recoverable for breach of contract anyway. See A.R. Holland, Inc. v. Wendco Corp., 884 So. 2d 1006, 1008 (Fla. 1st DCA 2004) (speculative damages); Ferguson Transp., Inc. v. N. Am. Van Lines, Inc., 687 So. 2d 821, 822 (Fla. 1996) (punitive damages). So for those types of damages, the limitations of remedies clause had no effect.

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As a result, even with the limitation of remedies clause, the Steins had an effective remedy to enforce Paradigm's contractual promise to complete the construction of the condominium within two years. They could have obtained an injunction and brought to bear the threat of civil and criminal contempt if

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4. Regardless of any breach by Paradigm, the Steins would not have been able to recover speculative or punitive damages. As the district court pointed out, however, under Florida law those types of damages are not recoverable for breach of contract anyway. See A.R. Holland, Inc. v. Wendco Corp., 884 So. 2d 1006, 1008 (Fla. 1st DCA 2004) (speculative damages); Ferguson Transp., Inc. v. N. Am. Van Lines, Inc., 687 So. 2d 821, 822 (Fla. 1996) (punitive damages). So for those types of damages, the limitations of remedies clause had no effect.

Paradigm was in the process of breaching by not working fast enough. Or if Paradigm had breached the contract by selling the property to another buyer, the Steins could have recouped the benefit of their bargain in the form of damages equal to the difference between their contract price and the fair market value of the property. That is in addition to the return of their deposit with interest. Insofar as remedies are concerned, the law would have threatened or inflicted enough pain on Paradigm for breaching the contract to make the contract one "obligating the seller or lessor to erect such a building thereon within a period of two years" within the meaning of §1702 (a)(2).[5]

2.

Alternatively, the Steins contend that even if the contract's limitation of remedies clause does not take it out of the § 1702 (a)(2) exemption, the force majeure clause does. That clause provides:

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5. The Florida Supreme Court has interpreted the Disclosure Act differently than we do. See Samara, 556 So. 2d at 1099–1101. Although we respect its views, we are not bound by Samara's interpretation even in cases arising in Florida because it is a federal statute we are interpreting. The Samara Court appears to have applied Florida statutory construction decisions in arriving at its conclusion. For example, it explicitly applied state law to give "great weight" to the HUD guidelines, id. at 1099, which is far more weight than we can give them under Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944). See infra note 6.

518 So. 2d 922, 923 (Fla. 2d DCA 1987) (excessive rain); *Camacho Enters., Inc. v. Better Constr., Inc.*, 343 So. 2d 1296, 1297 (Fla. 3d DCA 1977) (heart attack). The court then concluded that the force majeure clause rendered Paradigm's obligation illusory under the Disclosure Act because the clause excuses delays that would "not qualify under Florida's impossibility of performance principles." Neither the district court nor the Steins have explained why the standard of legal impossibility should be the measure of obligation under the §1702(a)(2) exemption—why any force majeure clause that extends beyond legal impossibility renders a contract non-exempt.[6]

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6. Paradigm argues that the force majeure clause is limited to legal impossibility because "Florida law onstrues force majeure clauses to exclude only those delays that are excusable under the doctrine of impossibility." To support that contention, Paradigm cites *Florida Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 675 (Fla. 1944), but that decision does not shoulder the proposition. In Florida Power the delay was caused by a hurricane—an act of God. Id. The court was concerned with only that kind of delay. That does not mean the court was narrowing the force majeure clause at issue (and all force majeure clauses in all Florida contracts) to cover only acts of God.

It appears to us that force majeure clauses broader than the scope of impossibility are enforceable under Florida law. *See Devco*, 518 So. 2d at 923 (holding that excessive rain excused delay under the contract's force majeure clause as a condition outside of the seller's control); *St. Joe Paper Co. v. State Dep't of Envtl. Regulation*, 371 So. 2d 178, 180 (Fla. 1st DCA 1979) (implicitly recognizing that a force majeure clause excusing delays for "any cause . . . not within the reasonable

So. 2d 1296, 1297 (Fla. 3d DCA 1977) (heart attack). The court then concluded that the force majeure clause rendered Paradigm's obligation illusory under the Disclosure Act because the clause excuses delays that would "not qualify under Florida's impossibility of performance principles." Neither the district court nor the Steins have explained why the standard of legal impossibility should be the measure of obligation under the §1702(a)(2) exemption—why any force majeure clause that extends beyond legal impossibility renders a contract non-exempt.[6]

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This force majeure clause covers events that may or may not happen, but whether they do is "beyond the control of the Seller." This type of clause is not an opt-out provision; it is limited in scope. *See Gen. Injectables & Vaccines, Inc. v. Gates*, 527 F.3d 1375, 1377 (Fed. Cir. 2008) (delays caused by subcontractors are within the builder's control and therefore not excused by "beyond the seller's control" force majeure clauses); *Hutton Contracting Co. v. City of Coffeyville*, 487 F.3d 772, 779 (10th Cir. 2007) (same); *Stand Energy Corp. v. Cinergy Servs., Inc.*, 760 N.E.2d 453, 457 (Ohio Ct. App. 2001) ("Mistaken assumptions about future events or worsening economic conditions, however, do not qualify as a force majeure."). The clause does not make the two-year duty illusory. *See Johnson Enters. of Jacksonville Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311 (11th Cir. (recognizing the "fundamental principle of contract law" and Florida law that an obligation is illusory when it "appears on its face to be so insubstantial as to impose no obligation at all"); *Port Largo Club, Inc. v. Warren*, 476 So. 2d 1330, 1333 (Fla. 3d DCA 1985) (recognizing that a contractual provision renders an obligation "illusory" when it allows a party "to breach with impunity"). Nor does the clause make the two-year duty subject to the seller's discretion. Events beyond a party's control are, by definition, not in its discretion.

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development company's heart attack as a circumstance "beyond the control" of the developer). We proceed with that understanding.

The two examples that concerned the district court do not concern us. Delays caused by excessive rainfall or by the seller suffering a heart attack are not within the seller's control or subject to his whim. No seller can command the sky to open up and more rain to fall, and we are not aware of anyone deliberately inflicting a heart attack on himself to delay the performance of a contractual duty. The Disclosure Act is an anti-fraud statute. *See Winter*, 777 F.2d at 1447. Allowing for reasonable delays caused by events beyond the seller's control does not promote or permit fraud. It does not transform the seller's obligation into an option. *See Atteberry v. Maumelle Co.*, 60 F.3d 415, 420 (8th Cir. 1995) ("The question is whether [the contractual provision] allows nonperformance by the seller at the seller's discretion." (internal quotation marks omitted)). Even though the contract excuses delays beyond the seller's control, it is still one "obligating"Paradigm to complete construction of the condominium within two years for purposes of § 1702(a)(2) of the Disclosure Act.[7]

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7. The HUD Guidelines state that "as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control." Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 24 C.F.R. § 1710 appx. A, at A-2, available at www.hud.gov/offices/hsg/ramh/ils/ilsexemp.cfm. They also say that "[c]ontract provisions which allow for nonperformance or for delays for construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected."

Appendix D – Order of the United States Court of Appeals for the Eleventh Circuit on Petition for Rehearing, entered on November 30, 2009.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10983

ALAN STEIN, KAREN STEIN,
Plaintiffs-
Counter-Defendants-
Counter-Claimants-
Appellees,

versus

PARADIGM MIRASOL, LLC,
Defendant-
Counter-Claimant-
Counter-Defendant-
Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

Before: TJOFLAT and CARNES, CIRCUIT JUDGES, and HOOD*, District Judge

PER CURIAM

The Petitioon(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

* Honorable Joseph M. Hood, United States District Court Judge for the Eastern District of Kentucky, sitting by designation.

Appendix E – Mandate of the United States Court of Appeals for the Eleventh Circuit, entered December 8, 2009.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10983

D.C. Docket No. 07-00071-CV-FTM-29-DNF

ALAN STEIN, KAREN STEIN,
Plaintiffs-
Counter-Defendants-
Counter-Claimants-
Appellees,

versus

PARADIGM MIRASOL, LLC,
Defendant-
Counter-Claimant-
Counter-Defendant-
Appellant.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this court.

Entered:	September 30, 2009
For the Court:	Thomas K. Kahn, Clerk
By:	Patch, Jeffrey

Appendix F – 15 U.S.C.A. § 1702

United States Code Annotated Currentness
Title 15. Commerce and Trade

(a) Sale or lease of lots generally

Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to--

(1) the sale or lease of lots in a subdivision containing less than twenty-five lots;

(2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years;

(3) the sale of evidence of indebtedness secured by a mortgage or deed of trust on real estate;

(4) the sale of securities issued by a real estate investment trust;

(5) the sale or lease of real estate by any government or government agency;

(6) the sale or lease of cemetery lots;

(7) the sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business; or

(8) the sale or lease of real estate which is zoned by the appropriate governmental authority for industrial or commercial development or which is restricted to such use by a declaration of covenants, conditions, and restrictions which has been recorded in the official records of the city or county in which such real estate is located, when--

(A) local authorities have approved access from such real estate to a public street or highway;

(B) the purchaser or lessee of such real estate is a duly organized corporation, partnership, trust, or business entity engaged in commercial or industrial business;

(C) the purchaser or lessee of such real estate is represented in the transaction of sale or lease by a representative of its own selection;

(D) the purchaser or lessee of such real estate affirms in writing to the seller or lessor that it either (i) is purchasing or leasing such real estate substantially for its own use, or (ii) has a binding commitment to sell, lease, or sublease such real estate to an entity which meets the requirements of subparagraph (B), is

engaged in commercial or industrial business, and is not affiliated with the seller, lessor, or agent thereof; and

(E) a policy of title insurance or a title opinion is issued in connection with the transaction showing that title to the real estate purchased or leased is vested in the seller or lessor, subject only to such exceptions as may be approved in writing by such purchaser or the lessee prior to recordation of the instrument of conveyance or execution of the lease, but (i) nothing herein shall be construed as requiring the recordation of a lease, and (ii) any purchaser or lessee may waive, in writing in a separate document, the requirement of this subparagraph that a policy of title insurance or title opinion be issued in connection with the transaction.

(b) Sale or lease of lots subject to other statutory registration and disclosure requirements

Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions requiring registration and disclosure (as specified in section 1703(a)(1) of this title and sections 1704 through 1707 of this title) shall not apply to--

(1) the sale or lease of lots in a subdivision containing fewer than one hundred lots which are not exempt under subsection (a) of this section;

(2) the sale or lease of lots in a subdivision if, within

the twelve-month period commencing on the date of the first sale or lease of a lot in such subdivision after the effective date of this subsection, or on such other date within that twelve-month period as the Secretary may prescribe, not more than twelve lots are sold or leased, and the sale or lease of the first twelve lots in such subdivision in any subsequent twelve-month period, if not more than twelve lots have been sold or leased in any preceding twelve-month period after the effective date of this subsection;

(3) the sale or lease of lots in a subdivision if each noncontiguous part of such subdivision contains not more than twenty lots, and if the purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot purchased or leased, prior to signing of the contract or agreement to purchase or lease;

(4) the sale or lease of lots in a subdivision in which each of the lots is at least twenty acres (inclusive of easements for ingress and egress or public utilities);

(5) the sale or lease of a lot which is located within a municipality or county where a unit of local government specifies minimum standards for the development of subdivision lots taking place within its boundaries, when--

(A) (i) the subdivision meets all local codes and standards, and (ii) each lot is either zoned for single

family residences or, in the absence of a zoning ordinance, is limited exclusively to single family residences;

(B) (i) the lot is situated on a paved street or highway which has been built to standards applicable to streets and highways maintained by the unit of local government in which the subdivision is located and is acceptable to such unit, or, where such street or highway is not complete, a bond or other surety acceptable to the municipality or county in the full amount of the cost of completing such street or highway has been posted to assure completion to such standards, and (ii) the unit of local government or a homeowners association has accepted or is obligated to accept the responsibility of maintaining such street or highway, except that, in any case in which a homeowners association has accepted or is obligated to accept such responsibility, a good faith written estimate of the cost of carrying out such responsibility over the first ten years of ownership or lease is provided to the purchaser or lessee prior to the signing of the contract or agreement to purchase or lease;

(C) at the time of closing, potable water, sanitary sewage disposal, and electricity have been extended to the lot or the unit of local government is obligated to install such facilities within one hundred and eighty days, and, for subdivisions which do not have a central water or sewage disposal system, rather than installation of water or sewer facilities, there must be

assurances that an adequate potable water supply is available year-round and that the lot is approved for the installation of a septic tank;

(D) the contract of sale requires delivery of a warranty deed (or, where such deed is not commonly used in the jurisdiction where the lot is located, a deed or grant which warrants that the grantor has not conveyed the lot to another person and that the lot is free from encumbrances made by the grantor or any other person claiming by, through, or under him) to the purchaser within one hundred and eighty days after the signing of the sales contract;

(E) at the time of closing, a title insurance binder or a title opinion reflecting the condition of the title shall be in existence and issued or presented to the purchaser or lessee showing that, subject only to such exceptions as may be approved in writing by the purchaser or lessee at the time of closing, marketable title to the lot is vested in the seller or lessor;

(F) the purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot purchased or leased, prior to signing of the contract or agreement to purchase or lease; and

(G) there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to

purchase or lease a lot;

(6) the sale or lease of a lot, if a mobile home is to be erected or placed thereon as a residence, where the lot is sold as a homesite by one party and the home by another, under contracts that obligate such sellers to perform, contingent upon the other seller carrying out its obligations so that a completed mobile home will be erected or placed on the completed homesite within a period of two years, and provide for all funds received by the sellers to be deposited in escrow accounts (controlled by parties independent of the sellers) until the transactions are completed, and further provide that such funds shall be released to the buyer on demand without prejudice if the land with the mobile home erected or placed thereon is not conveyed within such two-year period. Such homesite must conform to all local codes and standards for mobile home subdivisions, if any, must provide potable water, sanitary sewage disposal, electricity, access by roads, the purchaser must receive marketable title to the lot, and where common facilities are to be provided, they must be completed or fully funded;

(7)(A) the sale or lease of real estate by a developer who is engaged in a sales operation which is intrastate in nature. For purposes of this exemption, a lot may be sold only if--

(i) the lot is free and clear of all liens, encumbrances, and adverse claims;

(ii) the purchaser or lessee (or spouse thereof) has made a personal on-the-lot inspection of the lot to be purchased or leased;

(iii) each purchase or lease agreement contains--

(I) a clear and specific statement describing a good faith estimate of the year of completion of, and the party responsible for, providing and maintaining the roads, water facilities, sewer facilities and any existing or promised amenities; and

(II) a nonwaivable provision specifying that the contract or agreement may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such contract or agreement or until such later time as may be required pursuant to applicable State laws; and

(iv) the purchaser or lessee has, prior to the time the contract or lease is entered into, acknowledged in writing the receipt of a written statement by the developer containing good faith estimates of the cost of providing electric, water, sewer, gas, and telephone service to such lot.

(B) As used in subparagraph (A)(i) of this paragraph, the terms "liens", "encumbrances", and "adverse claims" do not include United States land patents and similar Federal grants or reservations, property reservations which land developers commonly convey

or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable or beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, if--

(i) the developer, prior to the time the contract of sale or lease is entered into, has furnished each purchaser or lessee with a statement setting forth in descriptive and concise terms all such liens, reservations, taxes, assessments and restrictions which are applicable to the lot to be purchased or leased; and

(ii) receipt of such statement has been acknowledged in writing by the purchaser or lessee.

(C) For the purpose of this paragraph, a sales operation is "intrastate in nature" if the developer is subject to the laws of the State in which the land is located, and each lot in the subdivision, other than those which are exempt under subsection (a), (b)(6), or (b)(8) of this section, is sold or leased to residents of the State in which the land is located; or

(8) the sale or lease of a lot in a subdivision containing fewer than three hundred lots if--

(A) the principal residence of the purchaser or lessee is within the same standard metropolitan statistical area, as defined by the Office of Management and Budget, as the lot purchased or leased;

(B) the lot is free and clear of liens (such as mortgages, deeds of trust, tax liens, mechanics liens, or judgments) at the time of the signing of the contract or agreement and until a deed is delivered to the purchaser or the lease expires. As used in this subparagraph, the term "liens" does not include (i) United States land patents and similar Federal grants or reservations, (ii) property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, (iii) taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable or beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, or (iv) other interests described in regulations prescribed by the Secretary;

(C) the purchaser or lessee (or spouse thereof) has made a personal on-the-lot inspection of the lot to be purchased or leased;

(D) each purchase or lease agreement contains (i) a clear and specific statement describing a good faith

estimate of the year of completion of and the party responsible for providing and maintaining the roads, water facilities, sewer facilities and any existing or promised amenities; and (ii) a nonwaivable provision specifying that the contract or agreement may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such contract or agreement or until such later time as may be required pursuant to applicable State laws;

(E) the purchaser or lessee has, prior to the time the contract or lease is entered into, acknowledged in writing receipt of a written statement by the developer setting forth (i) in descriptive and concise terms all liens, reservations, taxes, assessments, beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, and adverse claims which are applicable to the lot to be purchased or leased, and (ii) good faith estimates of the cost of providing electric, water, sewer, gas, and telephone service to such lot;

(F) the developer executes and supplies to the purchaser a written instrument designating a person within the State of residence of the purchaser as his agent for service of process and acknowledging that the developer submits to the legal jurisdiction of the State in which the purchaser or lessee resides; and

(G) the developer executes a written affirmation to the effect that he has complied with the provisions of this

paragraph, such affirmation to be given on a form provided by the Secretary, which shall include the following: the name and address of the developer; the name and address of the purchaser or lessee; a legal description of the lot; an affirmation that the provisions of this paragraph have been complied with; a statement that the developer submits to the jurisdiction of this title with regard to the sale or lease; and the signature of the developer.

(c) Rules and regulations

The Secretary may from time to time, pursuant to rules and regulations issued by him, exempt from any of the provisions of this chapter any subdivision or any lots in a subdivision, if he finds that the enforcement of this chapter with respect to such subdivision or lots is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the public offering.

Appendix G – 15 U.S.C.A. § 1707

Title 15. Commerce and Trade

(a) Contents of report

A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) Promotional use

The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

Appendix H – 61 Fed. Reg. 13596, 13603 (Mar. 27, 1996)

Part IV--Statutory Exemptions Requiring No Determination by HUD

The discussions that immediately follow pertain to 15 U.S.C. 1702(a) (1) through (8). The exemptions are set forth in the regulations at 24 CFR 1710.5 (a) through (h). These provisions exempt sales from both the anti-fraud and the registration provisions of the Act.

(a) Twenty-five Lots. (15 U.S.C. 1702(a)(10) and 24 CFR 1710.5(a)).

This section exempts the sale or lease of lots in a subdivision (i.e., lots offered pursuant to the same common promotional plan) that contains fewer than 25 lots. If a subdivision contains 25 or more lots, but fewer than 25 of those lots are offered for sale under a common promotional plan, those sales would be exempt. Thus, in a subdivision of 28 lots in which 4 lots are not offered for sale because, for example, they are permanently dedicated to the public for a park, the sale of the remaining 24 lots is exempt.

If fewer than 25 lots are acquired in a larger subdivision, the offer of these lots may be subject to the Act if the acquiring party is in any way acting in concert with the previous or current developer of the balance of the subdivision. Correspondingly, if fewer

than 25 lots are acquired in a larger subdivision, the offer of the lots may be exempt if there is neither an identity of interest between the acquiring party and the previous or current developer nor any form of concerted action that constitutes a common promotional plan.

Since the fewer than 25 lots exemption is based upon the number of lots as opposed to the number of sales, resales of a lot will not be counted toward the fewer than 25 lots limit.

(b) Improved Lots, 15 U.S.C. 1702(a)(2).

Section 1702(a)(2) of Title 15 of the United States Code exempts (1) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building; or (2) the sale or lease of land under a contract obligating the seller or lessor to erect such a building on the lot within a period of two years.

For a building or unit to be considered complete, it must be physically habitable and usable for the purpose for which it was purchased. A residential structure, for example, must be ready for occupancy and have all necessary and customary utilities extended to it before it can be considered complete. Manufactured home lots with pads but no structure, even if improved with utilities and roads, will not qualify for this exemption. Recreational vehicles are not considered buildings.

If a seller (developer) is relying on this exemption and the residential, commercial, condominium or industrial building is not complete, the contract must obligate the seller to complete the building within two years. If the contractual obligation is not present, the sale is not exempt. The two-year period normally begins on the date the purchaser signs the sales contract. A contract that conditions construction upon acts of a buyer will not exempt the sale. The essence of this exemption is that it applies to the sale of a house (if not built at the time of sale, then to be built within two years after the sale).

HUD's interpretation of what constitutes an obligation to construct a building relies on general principles of contract law. Provisions for purchaser financing and remedies clauses are matters to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located. However, such clauses may not alter the obligation of the seller to build. For example, if the type and terms of financing are subject to negotiation between buyer and seller, but the buyer is unable to obtain financing as a condition of the obligation to build, then the sale fails for exemption purposes. The inability of the buyer to obtain construction financing will not relieve the seller from the obligation to build, thereby leaving the buyer with a lot free of a construction obligation. Since the nature of the transaction is the sale of a house (or other structure), there should be no reason for separate construction financing in the normal course of

business.

The contract must not allow nonperformance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for reasons normally within the seller's control is not acceptable for use under this exemption. Similarly, contracts that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to construct. HUD's position is not that a right to specific performance of construction must be expressed in the contract, but that any such right that purchasers have must not be negated. For example, a contract that provides for a refund or a damage action as the buyer's sole remedy would not be acceptable.

Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected. For example, provisions to allow time extensions for events or occurrences such as acts of God, casualty losses or material shortages are generally permissible. Also permissible, in the case of multi-unit construction, is a clause conditioning the completion of construction or closing of title on a certain percentage of sales of other

units. The presale period cannot exceed 180 days from the date the first purchaser signs a contract in the project or, in a phased project, from the date the first purchaser signs a sales contract in a phase. Such a clause may not extend the overall two- year obligation to construct.

Although the factual circumstances upon which nonperformance or a delay in performance is based may vary from transaction to transaction, as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control.

Because of the variations in applicable contract law among the states and the many different provisions that are used by sellers in construction contracts, HUD may condition its advisory opinions regarding this exemption on representations by local counsel as to the current status of state law on the relevant issues. For example, the Florida Supreme Court has ruled that there must be an unconditional commitment to complete construction within two years and that the remedies available to the purchaser must not be limited. Samara Development Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990). See also Schatz v. Jockey Club Phase III, Ltd., 604 F. Supp. 537 (S.D. Fla. 1985). Developers, especially those in Florida, should be aware of these decisions, as well as decisions in other jurisdictions, e.g., Markowitz v. Northeast Land Co.,

906 F.2d 100 (3d Cir. 1990).

For a different view, readers should refer to Attebury v. Maumelle Company, 60 F.3d 415 (8th Cir. 1995), in which the court upheld a contractual provision to build as sufficient to qualify for the exemption despite the fact that the contract then shifted that responsibility to the buyer. This revision of the Guidelines dealing with the ``Improved lot" exemption is in reaction to the Maumelle decision. At the time of this writing another case of interest was pending in the United States District Court for the Eastern District of Michigan. Whether it ultimately will result in a decision on the Land Sales issues is unknown, as it is the understanding of the Department that settlement negotiations are ongoing. The court is considering those issues on remand from the Court of Appeals for the Sixth Circuit. See Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F.3d 1054 (6th Cir. 1995).

Since questions about this exemption most often arise in connection with condominiums, developers and others should be aware of the decision in the case [[Page 13604]] of Winter v. Hollingsworth Properties Inc., 777 F.2d 1444 (11th Cir. 1985), in which the court held that the Interstate Land Sales Full Disclosure Act applied to the sale or lease of condominium units. This ruling is in consonance with the Department's longstanding position on the condominium issue. The weight of authority of other cases, both Federal and

State, supports the Department's position. Therefore, it continues to be the Department's policy that the mere use of the condominium form of ownership does not determine jurisdiction of the Act and that developers should look to the specific requirements of the statutory and regulatory exemptions as amplified in these Guidelines to determine the applicability of the Act.